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IN THE

Supreme Court of the United States

October Term, 1989

PATRICK M. ZILL,
Petitioner,

vs.

AVIS-RENT-A-CAR SYSTEMS, INC.,
Respondent.

REPLY BRIEF OF PETITIONER

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A. In reply to Respondent's statement, the law may pertain to an at-will employment, but the case before this Court is not an at-will employment case. Joint Exhibit "A" also marked as Plaintiff's Exhibit 12A is the manual for Respondent's Non-Union Employees.

On November 12, 1987 Judge James L. Graham held an oral hearing on Respondent's Motion for Summary Judgment. We call the Court's attention to the transcript of the hearing on Page 16, Lines 9 through 20:

> "THE COURT: FIRST OF ALL, LET'S FIND OUT IF IT DID APPLY TO HIM, BECAUSE YOUR PRIMARY ARGUMENT WAS THAT THIS WAS A STRAIGHT EMPLOYMENT-AT-WILL

SITUATION. NOW WE HAVE A DOCUMENT THAT MAY VERY WELL CHANGE THAT POSITION. VERY FRANKLY AS I READ THIS DOCUMENT, IT APPEARS TO ME TO BE A POWERFUL ITEM OF EVIDENCE IN THE PLAINTIFF'S FAVOR IN THIS REGARD. I AM NOT PRE-JUDGING THE CASE IN THAT RESPECT, BUT IT SEEMS TO ME THAT THIS KIND OF DETAILED SET OF RULES AND REGULATIONS PARTICULARLY AS THEY APPLY TO TERMINATION OF EMPLOYMENT, MAY VERY WELL MODIFY THE TRADITIONAL-AT-WILL DOCTRINE UNDER BOTH MERS AND THE PHUNG CASES."

Judge Graham overruled Respondent's Motion for Summary Judgment. At this date the evidence that Ohio Bureau of Employment Services found that Respondent was wrongfully discharged. At this time the Court's Civil Docket continuation sheet contained the following filings: Depositions of Joseph Meyer and Patrick Zill; Motion of Defendant for Summary Judgment; Motion of Plaintiff to Supplement Final Trial Order; Motion of Plaintiff to Compel Appearance of Defendant for Deposition; Memorandum of Defendant to Compel Appearance of Defendant for Deposition.

The case was transferred to Judge George Smith December 11, 1987. On June 28, 1988 Judge Smith sustained Respondent's Motion for Summary Judgment.

Respondent requested an oral hearing on the Motion to Reconsider Judge Graham's order, but was refused. The ruling by Judge Smith must have been made through some misapprehension. This is not a case of an at-will employment. The contract in this case is the manual. The two pages, 1 and 5, are part of the manual, and are as follows: Page 1—Employment Processing. The Court will note that under Procedure, Number 1 is the

offer to the candidate; and Page 5, designated as *Sign On*, is a provision for the candidate's signature (See Addendum, p. A2).

The pleadings, affidavits, memorandums, all describe the conference that Petitioner and Respondent's Agent held before Petitioner accepted the job. Petitioner's foremost reason for accepting the job offer by Respondent was because he was led to believe that besides the best benefits known to Petitioner, the fact that he would not be hired and fired without cause was of utmost importance to Petitioner.

Petitioner read the manual and talked about the terms in the manual. Respondent wanted particularly to know why Petitioner would take a job which would pay Petitioner less money than he was at the time making. Petitioner told Respondent that it was because the job was a "protected job", that he was content that it was a protected job until he would be pensioned off.

Petitioner had every reason to rely on the fact that the job was not an at-will job. The manual recited this fact at great length. The advertisement, Respondent's Exhibit 7, was an inducement to sign-up as Respondent's Non-Union-Employee.

The Employment Manual is the written agreement between Respondent and Petitioner. Respondent breached its own Rules and Regulations by "side-stepping" its written regulations in the termination of Petitioner's employment, which are very specific.

The purported written notice was dated March 28, 1984 whereas Petitioner was fired on March 9, 1984. The purported written notice is in accordance with the Rules and Regulations of the manual, and the manual is the Joint Exhibit A, also marked as Plaintiff's Exhibit 12A.

We urge the Court to grant Petitioner the right to a Trial by Jury to determine the issues in the case before the Court.

B. In reply to B, the U.S. Circuit Court comitted error in reversing Judge Graham's Denial of Summary Judgment. There was positively no reason for such reversal. The cited law did not consider the facts in the case before the Court.

The U.S. Circuit Court and the U.S. Court of Appeals failed to consider the fact that Ohio Bureau of Employment Services found that Petitioner was wrongfully discharged.

The Court of Appeals and also the Circuit Court failed to consider that the purported warning notice dated March 28, 1984 is tainted with fraud. Petitioner was fired on the 9th of March, 1984 and was already found by Ohio Bureau of Employment Services to be wrongfully discharged.

For authority we cite the case of *Ardith Mcpherson, plaintiff-appellant v. Walter Rankin,* individually and in his official capacity, case No. 88-2399 United States Court of Appeals Fifth Circuit (July 12, 1984):

> Syl. 7. It is not the district Court's function on a motion for Summary Judgment to resolve any genuine issue of material fact or make determinations as to the credibility of witnesses, but instead Court must consider facts presented and resolve all doubts in light most favorable to the non-moving party.

Judge George Smith and the Court of Appeals totally disregarded this procedure.

We submit that Judge Graham denied motion for Summary Judgment when the fact that Petitioner was found to be wrongfully discharged was not before the Court at that time.

For the Circuit Court and the Court of Appeals to disregard the ruling entirely would not be to the Court's credit.

The fact is that Respondent did not appeal the decision of the Bureau of Employment Services.

> SINCE THAT DETERMINATION WAS APPEALABLE, BOTH ADMINISTRATIVELY AND ULTIMATELY JUDICIALLY, AND RESPONDENT ELECTED NOT TO DO SO, THE PRINCIPLE OF RES JUDICATA APPLIES.

Pullar v. UpjonHealth Care Services, Inc., et al., 21 Ohio App. 3d 298, citing *United States v. Utah Construction Co.*, 384 U.S. 394, at 422 (1966) (listed 2nd page Motion to Reconsider).

The manual, *Avis Non-Union Employees,* was not a guideline; it is a spelled out contract between the employer and employee. Under the manual the employer was active in a dual capacity as employer and as mediator.

Its use of one of the provisions in giving the purported "warning" notice acknowledges the fact that it is a provision for Avis Non-Union Employees, and that such provision is part of the manual.

The case sub judice must be reversed:

Scheuer v. Rhodes, 416 U.S. 232 (40 L. Ed 2d 90)

> "When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admission, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims."

The Supreme Court in *Scheuer* addressed the well-established requirement that when a Motion to Dismiss is filed pursuant to Federal Rules of Civil Procedure, the Trial Court must construe the allegations presented in the complaint "favorably to the pleader" and this is so even when "recovery is very remote and unlikely, but that is not the test".

C. In reply to C, it is a denial of due process for a Trial Court to grant summary judgment, disregarding all the facts in the case before this Court. Petitioner did request an oral hearing as shown by the Index Sheet of the U.S. District Court, which states that Petitioner requested oral hearing, but was denied an oral hearing.

D. In reply to Respondent's Statement D, Page 7 of Respondent's Brief reads as follows:

> "D. This Court Should Not Review the Allegation That Respondent 'Extend(ed) Itself in a Dual Capacity Towards (Petitioner And) Ha(d) a Duty to Perform as Mediator' Because Petitioner Raised That Issue For the First Time in This Petition For Writ of Certiorari."

Statement D is absolutely not true.

I

The first time the Petitioner used the statement was on November 12, 1987 at the oral hearing before Judge Graham and in Petitioner's Memorandum Contra Motion for Summary Judgment. It is as follows:

> "Plaintiff prays the Honorable Court to overrule Defendant's Motion for Summary Judgment for the reason that there are factual issues which should be decided by a Jury. THE CASE SUB JUDICE IS NOT LIKE ANY OTHER CASE; IT IS UNUSUAL IN THAT IT PROTECTS ITS EMPLOYEES MORE THAN A UNION WOULD PROTECT THE EMPLOYEES, EXHIBIT 12 ADVERTISED FOR CAREER-MINDED PERSONS, AS SHOWN BY EXHIBIT B."

II

The second time that Petitioner used the expression was in the pleadings in the U.S. District Court of Appeals, which is as follows:

> "We urge the Court to find that loyalty and confidence are necessary elements in the case before the Court. Appellee is standing in a dual capacity as employer and as a protector of its Non-Union Employees."

III

The third time that Petitioner used the expression is in the U.S. District Court of Appeals; the reply on Page 2 is as follows:

> "The cases cited by Appellee are not in point. In each of the cases, the factual situations were all different. In the case before the Court, the facts are very novel. Appellee acted as the Employer, and also took the place of the Union. One of Appellee's Brochures, on its cover page recited *"AVIS—HIGHLIGHTS OF YOUR BENEFIT PROGRAM—NON UNION EMPLOYEES."*

This Court is bound to give meaning of what Avis meant when it offered itself as the *Mediator between itself and Appellee.*

The writer was well aware for many years that an issue not raised in a lower Court may not be used in the Appellate Courts.

We urge the Court to find that the essence of this case which will be determinative of the relationship between the parties must not be lost. We urge the Court to grant Petitioner the rights he is entitled to under our Constitution.

At the time Appellant was fired, Appellant was a vested employee. We submit that *Appellee acted in a dual capacity with its employees.* The Employees Manual was very specific about the offer to its employees, and the acceptance of the offer. The qualifications of the employee, the opportunity for advancement, and the numerous steps in case of termination, are all outlined in the Employees Manual, as well as the appeal process and the warning process. The method under which warnings were to be exercised are very specifically outlined in the Employees Manual.

Appellant did not receive any warnings until after he was fired. The three letters which Appellee mentions were delivered approximately two weeks after Appellant was fired, and already receiving benefits from the Ohio Bureau of Employment Services. Appellee in not living up to its own rules and regulations shows *bad faith, in its dual capacity.*

In reply to Item II, Page 8 of Respondent's Brief, Judge Smith in the U.S. District Court and the Court of Appeals overlooked the fact that the purported Notice of Warning dated March 28, 1984 is somewhat tainted with fraud. Petitioner was fired on the 8th day of March, 1984, and the Ohio Bureau of Employment Services determined that Petitioner was wrongfully discharged on the 29th of March 1984.

The case that Respondent is citing law on is not the case which is before this Court. The Court of Appeals states:

> "Zill argues here that the employee handbook and the oral comments of Avis' agent created an enforceable binding employment contract. Zill offered, and we can see no evidence of a meeting of

> the minds as to the creation of an employment contract. Thus we see no error in granting summary judgment."

If the Court were to examine Joint Exhibit A also marked as Plaintiff's Exhibit 12A, and sheets Number 1 and 5 which are an offer and acceptance, and examine the affidavits of Petitioner and affidavits of Robert Schmidt, Petitioner's immediate Supervisor, the Court would know that this case should be decided by a Jury. These are the facts that the Jury must decide.

In reply to the reason why the Court committed error in refusing Petitioner to file an Amended Complaint, there were at least four months between the request to amend and the trial date. Respondent knew from the pleadings in the case before this Court, that there was $3,090.00 due in commissions.

That Petitioner learned through the depositions the real reason why Joe Meyers fired Petitioner. The affidavit of Robert Schmidt is attached hereto (Addendum, p. A3) and made a part of the reply as if fully rewritten herein, and made a part of the reply. The affidavit gives the true reason why Petitioner was fired.

Respondent would not be greatly prejudiced by allowing the Amended Complaint to be filed, since all facts are within the knowledge of Respondent.

We urge the Court to grant the Writ of Certiorari.

The District Court committed error in denying Appellant the right to amend his complaint. Civil Rule 15(A) was intended to be liberal in granting litigants, in the interest of justice, the right to amend pleadings.

> *Birmingham Fire and Insurance Co. v. River Downs Race Track* (1985) 26 Ohio App. 3d 139

"Civ. R. 15(A) favors a liberal amendment policy and a motion for leave to amend should be granted absent a finding of bad faith, undue delay or undue prejudice to the opposing party."

Hoover et al., Appellants v. Sumlin, Randolph Township, Appellee, et al. (1984) 12 Ohio St. 3d 1.

'1. A motion for leave to amend a pleading made pursuant to Civ. R. 15(A) should be granted 'freely' when justice so requires."

CONCLUSION

FOR THE REASONS STATED WE URGE THE COURT TO CERTIFY THE WRIT OF CERTIORARI IN THE INTEREST OF JUSTICE.

Respectfully submitted,

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(216) 688-4047

Attorney for Petitioners

ADDENDUM

EXCERPT FROM AVIS EMPLOYEE'S MANUAL

Page 1:

EMPLOYMENT PROCESSING

POLICY:

The company desires to hire the highest quality employee to fill each position with a minimum of time lost between a position opening and commencement of employment by the new employee.

PROCEDURE:

1. Candidates will be interviewed by manager with the open position.
2. Qualified applicants will be referred to the district manager for additional interviewing.
3. District manager's office will obtain verification information on previous employment of the candidate.
4. If satisfactory past verification is established, the manager will establish the starting wage and date and make an offer to the candidate.

Page 5:

SIGN ON

POLICY:

Sign on will indicate to each new employee that the company wishes them to have as much information and knowledge as possible.

Signing on includes:

1. Completing bonding application.
2. Enrollment in insurance programs.
3. Completing job verification forms.
4. Complete withholding statement (W-4).
5. Starting wage and date confirmation.
6. Receives time card (if applicable).
7. Employee receives identification card.

AFFIDAVIT OF ROBERT SCHMIDT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case Number: C2-85-691

PATRICK M. ZILL,
Plaintiff,

vs.

AVIS RENT A CAR SYSTEM, INC.,
Defendant.

AFFIDAVIT OF ROBERT SCHMIDT

Robert C. Schmidt, after first being duly sworn, deposes and says that the following statement is true.

In March of 1984, Joe Myer came to my office. He asked me what Mr. Zill's weakest ability was in sales. I told him I thought he was one of the best salesmen in the City, and didn't have any. He then inquired about his sale's orders and paper work.

I told him that all the top salesmen I knew always were a little sloppy on paper work, but their sales more than made up for it.

He then told me he wanted Pat fired and wanted me to do it. I told him I had no reason to fire him, and that he would have to do it. At least twice and maybe more, he referred to Pat as "an old man", and asked me what I wanted an old man like that working for me.

/s/ ROBERT C. SCHMIDT
ROBERT C. SCHMIDT

Sworn to, and subscribed before me this 5 day of Nov. 1987.

/s/ LEDA M. C. HARTWELL
LEDA M. C. HARTWELL
LEDA C. HARTWELL
Attorney-at-Law
Notary Public—State of Ohio
My commission has no expiration date
Section 147.03 R.C.